SUPREME COURT, U. S.

FILED

JUN 17 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1539
1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABBOTT, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION FOR EXPEDITED REVIEW, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL RACHLIN
JAMES SPITZER
DAVID DRASCHLER
Scholarship, Education and Defense Fund, Inc.
164 Madison Avenue
New York, New York 10016

BERT NEUBORNE
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

LEE A. ALBERT
Center on Social Welfare Policy and Law
401 West 117 Street
New York, New York 10027
280-4112
HENRY A. FREEDMAN
SYLVIA ANN LAW
ROBERT P. BORSODY
Of Counsel

MARTIN GARBUS
Roger Baldwin Foundation of the American Civil Liberties Union
156 Fifth Avenue
New York, New York 10012

INDEX

PAGE

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statutes Involved 5

Statement of the Case 9

Motion to Expedite: To Prevent New York From Violating Its Federal Trust and Thereby Causing Irreparable Injury to 850 Thousand Needy Children and Mothers, an Expeditious Final Determination of the Issues Presented Must Be Had. Alternatively the Stay Issued by the Second Circuit Must Be Vacated 21

A. Irreparable Injury to Petitioners 21

B. Violation of New York's federal trust 23

C. Finality of the proceedings below 27

D. Vacating of Stay 28

The Traditional Reasons for Granting Certiorari Plainly Exist Here 33

CONCLUSION 37

TABLE OF AUTHORITIES

Cases:

Aaron v. Cooper, 358 U.S. 27, 1 (1958) 1, 27

Br. of Locomotive Engineers v. Chicago, Rock Island and Pac. Ry., 382 U.S. 423 (1966) 17

PAGE

Burns v. Montgomery (stay denied May 10, 1968, Douglas, J.) 29

Damico v. California, 389 U.S. 416 (1967) 17

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960) 17, 25

Green v. Department of Public Welfare (stay denied Sept. 1, 1967, Black, J.) 29

Hannah v. Larche, 361 U.S. 910, 363 U.S. 420 27

Harrell v. Tobriner (stay denied Dec. 29, 1967, Brennen, J.) 29

Hodge v. Dept. of Public Welfare (Civil No. ....., S.D. Fla.) 11

Jefferson v. Hackney (Civil No. 3-3012-B, N.D. Tex.) .. 11

Kelly v. Wyman (stay denied Jan. 10, 1969, Harlan, J.) 29

King v. Smith, 392 U.S. 309 (1968) 4, 10, 14, 16, 17, 24, 25, 28, 30, 35

Lampton v. Bonin, —— F. Supp. —— (Civil No. 68-2092, E.D. La., April 21, 1969) 11, 29, 34

Magnum v. Coty, 262 U.S. 159 (1923) 32

McCleod v. General Electric Co., 385 U.S. 533 (1966) .. 31

Public Service Board of Vermont v. U.S. Interstate Commerce Commission, 87 S. Ct. 3 (1966) 32

Siler v. Louisville & Nashville Ry. Co., 213 U.S. 175 (1909) 17

Smith v. Reynolds (stay denied Jan. 4, 1968, Brennen, J.) 29

PAGE

Thomas v. Burson (Civil No. 2381, M.D. Ga.) 11

Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952) 27

Williams v. Dandridge (stay denied, Warren, C.J.) 29

Williams v. Rhodes, 37 U.S.L.W. 4001 (1968) 27

Williams v. Rhodes, 89 S. Ct. 1 (1968) 31

Wilson v. Girard, 354 U.S. 524, 928 (1957) 27

Constitutional Provision:

United States Constitution
Fourteenth Amendment 3

Rules:

Rule 20 of the Supreme Court Rules 27

18 N.Y.C.R.R. §352.5(N)(b) 22

45 C.F.R. §253.20(a)(ii) 11

Statutes:

28 U.S.C. §47 19

28 U.S.C. §1254(1) 3

28 U.S.C. §1331 ..... 4, 13, 17

28 U.S.C. §1343(3) 4, 13

28 U.S.C. §2281 3

42 U.S.C. §602(a)(1) 13

42 U.S.C. §602(a)(10) 35

42 U.S.C. §602(a)(23) 3, 4, 5, 10, 11, 13, 18, 23, 24, 25, 26, 27, 30, 31, 33, 34, 35, 36

42 U.S.C. §1983 ..... 4, 13, 17

PAGE

New York Social Services Law, L. 1940, Ch. 619, Section 7, amended by L. 1950, Ch. 364, Section 2 11

New York Social Services Law, L. 1969, Ch. 184 (March 31, 1969)

Section 1 5

Section 5 6

Section 131-a 4, 6, 11, 12, 13, 14, 16, 18, 26, 29

Other Authorities:

Altmeyer, The Formative Years of Social Security (Univ. of Wis. Press 1968), pp. 75-83 24

W. Bell, Aid to Dependent Children (Colum. Univ. Press 1965), pp. 71-73 24

113 Cong. Rec. p. 16817 (Daily Ed., Nov. 20, 1967) 11

33 Fed. Reg., p. 10230 (1968) 11

34 Fed. Reg., p. 1392 (1969) 11

Handbook of Public Assistance Administration, Part IV, § 6300(g) 22

H.E.W. Handbook of Public Assistance Administration, Pt. I, § 4230 15

7 Moore's Federal Practice (2d Ed.) § 62.05 32

Sen. Rep. 844, 90th Cong., 1st Sess. (1967) 10

Vinson, Work of the Federal Courts, Address to the Amer. Bar. Assoc. Sept. 7, 1949, 69 S. Ct. Reporter V 23

"Welfare in Review," U.S. Department of H.E.W., Vol. 6, p. 28 (September-October, 1968) 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

MOTION FOR EXPEDITED REVIEW, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

Petitioners pray for the issuance of a writ of certiorari,** to review determinative orders of the Court of

* An application to vacate the circuit court's stay of preliminary injunction has this day been presented to Mr. Justice Harlan, Circuit Justice.

** This Court has allowed argument on petitions for certiorari, particularly in cases where there is a pressing necessity for a prompt determination. See, e.g., *Acron* v. *Cooper*, 358 U.S. 27 (1958).

Appeals for the Second Circuit, entered on June 11 and 16 Appendix (66A), after expedited consideration of respondents' appeal from a preliminary injunction issued by District Judge Weinstein (Eastern District, New York) Appendix (64A). The *per curiam* orders of Circuit Judges Lumbard and Hays, Judge Feinberg dissenting, stay indefinitely the preliminary injunction enjoining New York from severely reducing, as of July 1, 1969, subsistence grants to some 850 thousand needy children and their parents under the Aid to Dependent Children program, *infra,* and deny petitioners' motion for an appropriate order disposing of the expedited appeal.

Petitioners also pray that this Court note the urgency and national importance of the federal statutory issue herein presented and afford expedited review during the closing days of this term of Court.

OPINIONS BELOW

The opinion of the one-judge district court in support of the preliminary injunction is not reported and is set forth in the Appendix (14A). The District Court's Order is set forth at (64A). The order of the Court of Appeals is set forth at (66A). The Court of Appeals has not rendered any opinion on the order which is here sought to be reviewed.

JURISDICTION

The judgment of the District Court granting preliminary injunction in favor of petitioners was entered on May 16, 1969. Appendix (64A). That day the District Court denied the respondents' motion for a stay. Appendix (64A). Respondents docketed an appeal to the Court of Appeals on May 19. The stay of the District Court injunction by the Court of Appeals was granted June 11. Appendix (66A). The Circuit Court declined to vacate its stay or issue a final judgment after motion and hearing on June 16. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), providing for the granting of a writ of certiorari upon the petition of any party before or after rendition of judgment by the Court of Appeals.

QUESTIONS PRESENTED

Petitioners' complaint in the District Court sought to enjoin the implementation of a New York statute setting forth standards of assistance for Aid to Families with Dependent Children which reduced substantially the grants paid in New York City and reduced even further the grants in other areas of the State to 850,000 AFDC recipients on the grounds that the statute violated 42 U.S.C. 602(a)(23) requiring that by July 1, 1969, AFDC standards and grants be increased to reflect the rising cost of living, and that the discrimination against residents of Nassau County violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was convened and found that it had been properly convened under 28 U.S.C. § 2281. Subsequent to final argument on both claims be-

fore the three-judge court, the state statute was amended giving the respondent discretionary power to correct the geographical discrimination. The three-judge court thereupon immediately dissolved itself stating that the constitutional claim was now moot or unripe or that petitioners had failed to exhaust state remedies and remanded the case to the single district for appropriate proceedings.

(1) Did the District Court abuse its discretion in retaining jurisdiction over the pendant wholly federal statutory claim, where the initially substantial constitutional claim conferring jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) was dismissed after final argument and submission of all claims?

(2) Did the District Court properly find that 28 U.S.C. § 1331 provides an alternative basis for federal jurisdiction of claims arising under the Social Security Act where the plaintiffs have in good faith alleged and shown that the monetary value of the federal right asserted and in controversy exceeds $10,000 for each AFDC family, exclusive of interest and costs?

(3) Does New York Social Services Law § 131-a substantially reducing the standards of assistance and grants paid for Aid to Families with Dependent Children as of July 1, 1969 violate the plain commands of Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), requiring an increase by July 1?

(4) Under this Court's decision in *King* v. *Smith*, 392 U.S. 309 (1968), is a justiciable controversy presented where recipients of Aid to Families with Dependent Children seek to redress injuries caused to them by the failure of state officials to comply with the fundamental plan

conditions of the Social Security Act while continuing to accept the substantial federal funds given in exchange for a commitment to comply with those federal conditions?

STATUTES INVOLVED

Section 402(a)(23) of the Social Security Act of 1935, added January 2, 1968 (42 U.S.C. § 602(a)(23)) provides:

> Sec. 402. (a) A State plan for aid and services to needy families with children must
>
> * * *
>
> (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part:

> Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.
>
> * * *

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

* * * *

§ 5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

§ 131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two

items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval

of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.

5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.

6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. ——, L. 1969 (May 9, 1969) of the State of New York provides:

Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:

4. Provided it accords with federal requirements, the regulations of the department shall provide that

the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

§ 3. This act shall take effect July first, nineteen hundred sixty-nine, except that section two of this act shall take effect immediately.

STATEMENT OF THE CASE

This case grows out of the need to determine the scope and force of a federal statute affecting hundreds of thousands of needy children and billions of dollars of welfare expenditures. A chronological statement of the operative events shows what is urgently and fundamentally at issue in this lawsuit.

Recognizing that the federal purpose of protecting the economic security of needy children through Aid to Families with Dependent Children (AFDC) was being undermined by disturbingly inadequate grants in all states and that

rising welfare rolls threatened even further reductions, Congress in January, 1968, imposed a significant federal requirement on the states for "increasing income of recipients of public assistance." Sen. Rep. 844, 90th Cong., 1st Sess. (1967). In this departure from the 32-year old policy of allowing states wide latitude in determining standards of need and amounts of payment under AFDC, see, *King* v. *Smith*, 392 U.S. 309 (1968), Congress mandated as a plan condition for continued state participation in AFDC that the states increase the prices of all items contained in their own defined standard of need in force on January 2, 1968, to reflect fully changes in living costs up to July 1, 1969, and to adjust grant levels accordingly. Section 402(a)(23), P.L. 90-248, Social Security Amendments of 1967, 42 U.S.C. §602(a)(23).

The statute, on its face and from its legislative history, represents an interim step, a holding action so to speak, against foreseeable deterioration in grant levels, to allow needed time for consideration of more comprehensive changes in our national welfare system. Congress' specific concern was that states presently would respond to the rising AFDC case load by reducing assistance grants which were already at or below minimum subsistence levels. The Congress thus stabilized prevailing grant levels and forbade anticipated reductions, while allowing the states ample time to July 1, 1969, to make the substantial legislative and administrative adjustment* (45A-49A).

The cost of living rose in New York 10.1% from the time of the last adjustment of AFDC need standards in May

---

* "The only reason why the delayed effective date is necessary is to give States an opportunity to change their state plans without taking away from them in the meantime the federal matching

1968, to July 1, 1969 (28aa).* Rather than increasing grants to meet the inflationary spiral, the New York legislature, in March, 1969, repealed long-standing authorization to Respondent to make yearly increases for rising living costs and to set grant levels "in accordance with standards of health and decency in the community," New York Social Services Law § 131, L. 1940, c. 619 § 7, amended by L. 1950, c. 364 § 2. In lieu thereof, the legislature itself established a reduced statutory schedule of grants based on the "costs of delivering the needs of recipients," and in explicit response "to the spiraling rise in welfare rolls and the expenditures therefor." New York Social Services Law § 131-a, L. 1969, c. 184 (March 31, 1969) (hereinafter Section 131-a). As the Governor described the Act: "My

---

funds." 113 Cong. Rec. p. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

The Department of Health, Education and Welfare (H.E.W.) issued regulations in July, 1968, and January, 1969, to guide and insure compliance by July, 1969. 33 Fed. Reg., p. 10230 (1968) and 45 C.F.R. § 253.20(a)(ii), 34 Fed. Reg., p. 1392 (1969). This compliance, predictably and characteristically in AFDC is not being had, and Petitioners know of suits now pending in at least four states, besides New York, to obtain the result Congress mandated by July 1, 1969.

A three-judge court rendered a preliminary decision in *Lampton* v. *Bonin*, —— F. Supp. —— (Civil No. 68-2092, E.D. La., April 21, 1969). Final argument has now been had in that case as well as in *Jefferson* v. *Hackney* (Civil No. 3-3012-B, N.D. Tex.) (three-judge) and *Thomas* v. *Burson* (Civil No. 2381, M.D. Ga.) (three-judge). A three-judge court has been convened in *Hodge* v. *Dept. of Public Welfare* (Civil No. ——, S.D. Fla.). Even H.E.W. acknowledges on admittedly partial information that many states will not be in compliance with 402(a)(23) on July 1, 1969.

* The record in this Court consists of the Appendixes of the Appellants and Appellees prepared for the Court of Appeals. Page numbers followed by "a" refer to Appellants' Appendix; those followed by "aa" refer to Appellees' Appendix. References to opinions below in the Appendix to this Petition are followed by "A."

proposal for limiting public assistance and care payments . . . will include elimination of the non-recurring special need grants [and] reduction of public assistance eligibility standards. . . ." *

During the 1969 legislative session, the Governor initially proposed an across-the-board 5% cut in all State expenditures. The cuts in most other areas were restored, but the AFDC budget for the fiscal year 1969-70 was cut even further by at least 13%, and perhaps 26%, from projected expenditures at current grant levels (28a-33a). This reduction in the State's 25% AFDC share compels a corresponding reduction in the 50% Federal matching funds and the 25% local share. The reduced statutory schedule, § 131-a, accommodates these budget cuts by reducing the amounts used to determine needs of families with older children and by abolishing entirely amounts to meet urgent, special or irregular needs, such as diets for diabetics and cardiacs, school lunch allowances, moving expenses and any replacement or initial purchase of clothing and home furnishings for all AFDC recipients in the State. For recipients outside of New York City, reductions in amounts and component items of essential need are even greater (23A-28A).

The same State budget for 1969-1970 which dictates severe reduction relies heavily on the 300-400 million dollars in federal AFDC funds paid to New York annually in exchange for the State's commitment to abide by the Federal Act. Without prior submission to H.E.W. for approval, Section 131-a was signed into law and the Respondent began steps toward full implementation through-

* Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970, at 14 Doc. No. 48.

out the state by July 1, 1969, precisely the date on which Federal law commands increased grants to reflect current prices. On April 16, the Department of H.E.W., in uncharacteristically swift fashion, "questioned" the cutbacks in light of Section 402(a)(23) and the AFDC statewide uniformity requirement, and requested information from the State (130a). The Legislature, without responding to H.E.W., adjourned until 1970, thus insuring implementation of the cutbacks, regardless of H.E.W.'s ruling on conformity, since the Respondent has been firmly bound to the reduced statutory schedules.

On April 9, ten days after the enactment of 131-a, this lawsuit was commenced in the Eastern District of New York to obtain an adjudication of validity *vel non* of the grant reductions under the federal Social Security Act and the United States Constitution, and an injunction to prevent implementation of the statute. Pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3) & (4) and § 1331, the suit was brought by ten families on behalf of themselves and the 850 thousand other mothers and children in New York entirely dependent on AFDC grants for the very rudiments of life —food, shelter, clothing and household furnishings. The complaint charged that 131-a violated the Federal statute requiring a cost of living increase; additionally, that 131-a violated the Equal Protection Clause and the AFDC requirement of statewide uniformity, 42 U.S.C. § 602(a)(1), with respect to residents of Nassau County where living costs are at least equal and likely higher than those in New York City.

Both sides agreed in the district court before Judge Weinstein that authoritative determination before July 1 was essential, and the Court established a highly-expedited

schedule. Jurisdictional questions, stemming from Respondents' plethora of objections and the question raised by this Court in *King* v. *Smith,* 392 U.S. 309, 313, n. 13, were initially explored in depth and resolved on the controlling authority of *King* v. *Smith.** H.E.W. agreed to, and did, appear as *amicus curiae,* as did the City of New York and Nassau County. Although bearing an equal and greater financial burden, none of these *amici* opposed Petitioners' challenge to the welfare cutbacks. The views of the federal agency were fully before the court (51A-56A).

A substantial evidentiary hearing, including testimony by state and city welfare officials, was held on April 23 on the extent and impact of the reductions and the process of implementation. The State Welfare Department opposed preliminary relief on the ground that maintaining the current assistance levels, even without the federally-mandated repricing, would "require the state to pay out 10 million dollars each month more than the amount payable pursuant to the new schedule, pursuant to 131-a—an amount completely irretrievable once disbursed" (182aa-183aa), in view of the impoverished circumstances of the recipient children and parents. Substantial and uncontradicted testimony and affidavits by welfare officials and medical experts established that temporary or permanent reductions in the subsistence grants now provided to needy families would result in immediate, substantial, and

---

* On April 15, Respondents moved to join the Department of Health, Education and Welfare as an indispensable party, arguing that despite *King* v. *Smith,* the only sanction against a state statute in conflict with the Social Security Act was cutoff of federal monies. H.E.W. strongly opposed the motion and it too was denied on the authority of *King* v. *Smith.* Appendix (1A).

likely permanent injury to physical and mental health and safety, particularly since current grant levels allowed for "marginal nutritional status" (163aa, 165aa, 25aa, 145aa, 132aa). The abolition of grants for medically-required diets and transportation posed very immediate hazards for certain vulnerable recipients.

It was further established that New York receives about $100,000,000 quarterly in federal funds for AFDC grants (30a), and that these federal monies, given in advance, would be utilized by New York after July 1, regardless of whether or not New York complied with the federal plan condition* These federal monies, too, are irretrievable once disbursed, there being no remedy for use of federal monies received under an invalid state plan.

Welfare officials agreed that a change from current grant levels to the new schedules would take from at least six to eight weeks to implement and somewhat longer to change back and that adjudication after full implementation for 850,000 recipients would create "sheer havoc" (117aa, 173aa, 194aa, 200aa). Although a special method allowing fully reversible steps toward implementation was available, it would not be used in the ordinary course of business (206aa).

On April 24, based on these findings, Judge Weinstein entered a temporary restraining order prohibiting the respondents from taking irreversible steps to implement the cutbacks and requiring the processing of applications for grants available under present state law in the ordinary course of business, some of which were being administratively denied in anticipation of the cutbacks. Ap-

---

* H.E.W. Handbook of Public Assistance Administration, Pt. I, § 4230.

pendix (4A). A three-judge court (Moore, C.J., Mishler, D.J. and Weinstein, D.J.), quickly convened by Chief Circuit Judge Lumbard, continued the restraining order and expedited hearing on cross motions for summary judgment on both claims. These motions were supported by extensive affidavits, exhibits, statistical material and charts, official documents, as well as the prior testimony and exhibits in the case. Extended argument was had on April 30 in which Respondents renewed a plethora of jurisdictional objections to both claims, all of which seemed controlled by *King* v. *Smith,* approving three-judge court consideration of a constitutional and pendant Social Security Act claim.* On May 9, before the awaited decision of the three-judge court, the Respondent secured a discretionary power to increase the lower grant schedules for other parts of the state up to the reduced New York City levels upon an unspecified administrative finding that living costs so warranted. The three-judge court forthwith on May 12, without motion, notice to the parties, hearing, or argument, ruled *per curiam* that although it had been properly convened, the substantial constitutional issue before it was now either moot or unripe by virtue of this then-unexercised administrative discretion to reduce or remove the discrimination mandated by 131-a, and suggested that the Nassau County Plaintiffs institute state court mandamus proceedings to compel Respondents to remove the challenged discrimination against them. The court remanded the case to the single judge for appropriate proceedings, with the statement that

* However, presiding Circuit Judge Moore was openly antipathetic to hearing argument on the pendent federal statutory claim, stating that "The reason we as a three-judge court are assembled is that you believe there is some Constitutional objection to that which is proposed to be done." Tr. 53, Document No.

> "We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs." Appendix (12A).

The temporary restraining order was renewed immediately by Judge Weinstein. Petitioners moved to be heard by the three-judge court on the dismissal of the constitutional claim, since requiring exhaustion, under whatever rubric, is inappropriate in an action under 42 U.S.C. § 1983, *Damico* v. *California,* 389 U.S. 416 (1967) and *King* v. *Smith, supra,* and since the hasty disposition of the constitutional claim leaving the pendent statutory issue unresolved seemed contrary to the course of proceedings endorsed in many cases. *E.g., Siler* v. *Louisville & Nashville Ry. Co.,* 213 U.S. 175 (1909); *Florida Lime & Avocado Growers Inc.* v. *Jacobsen,* 362 U.S. 73 (1960); *Br. of Locomotive Engineers* v. *Chicago, Rock Island and Pac. Ry.,* 382 U.S. 423 (1966) and *King* v. *Smith, supra.*

This motion was pending on May 16, when Judge Weinstein transformed the T.R.O. into a preliminary injunction, supported by an extensive 64-page opinion, to allow New York an immediate interlocutory appeal to the Circuit Court. Appendix (14A). Federal jurisdiction was based on the pendency of the federal statutory claim to the constitutional claim, *King* v. *Smith,* and alternatively, on general federal question jurisdiction under 28 U.S.C. § 1331, the amount in controversy exceeding $10,000. Other jurisdictional bases were not reached. The exhaustive opinion analyzes in detail the impact and extent of the overall

reduction in AFDC grants of from 12% to 20% as the result of the new reduced grant schedules and standards of need. Appendix (39A-41A).* The court held that New York had, in all likelihood, breached its federal trust and the federal plan conditions by severely reducing grants and standards of assistance. It also found that harm to recipients from implementation of these cutbacks far outweighed any possibility of harm to the State from the injunction. Appendix (22A-25A).

The District Court denied a stay and sought to proceed swiftly to final judgment. The State declined to participate in further proceedings in the District Court during the course of the interlocutory appeal. On May 21, the Court of Appeals, Judges Lumbard, Feinberg and Timbers, after hearing, first granted, then denied the State's application for a stay but granted its motion for a preference, setting the case down for a hearing before a panel specially designated by Chief Judge Lumbard** on June 3, 1969, with

---

* The district court rejected New York's multifarious explanations and defenses against the allegation that the large reductions in grant levels violated the plain federal mandate, such as: (1) the federal statute does not apply to New York at all since it offers relatively liberal welfare benefits; (2) the federal statute "expires" on July 1, 1969, its effective date; (3) the statute has no application in states, such as New York, which pay in full "the amounts used to determine the needs of individuals"; (4) certain needs met under AFDC are "totally gratuitous" and not a part of the amounts used to determine the needs of individuals; (5) New York complied with 402(a)(23) in establishing the current grant schedules in 1968 and the new Section 131-a represents no reduction; and (6) even if the new law reduces grants, this is justifiable because the elimination of grants to meet the needs of older children and other non-universal needs, particularly those dictated by health conditions, was a simplification, Appendix (43A-55A).

** Circuit Judge Moore, the presiding judge on the three-judge district court panel, was specially designated to sit on the circuit

briefs and appendices due within six days for each party. The Court of Appeals indicated that the court below could continue to move toward summary judgment and encouraged the parties to cooperate with the scheduling of the District Court. On June 4, after full briefing and argument before the special panel, that Court again denied the motion for a stay on the ground that final decision would be rendered forthwith. On June 5, the following day, the three-judge court denied Petitioners' pending motion for a hearing on the dismissal of the constitutional claim.* The next day, June 6, the Respondent issued proposed regulations slightly increasing schedules for some counties outside New York, but leaving a substantial disparity between grants to recipients in Nassau County and New York City. The invidious geographical discrimination thus remains. Petitioners immediately brought this to the attention of the now moribund three-judge court, which took no further action after denying the rehearing motion. Respondents finally responded to H.E.W.'s request of April 15 for information by submission of these regulations on June 5. H.E.W. has not responded to date.

On June 11, 1969, the Court of Appeals *sua sponte* granted the twice previously denied motion for a stay of the injunction, noting that due deliberation of the appeal was now had and that opinions would follow in due course. Appendix (66A). Judge Feinberg dissented. New York is

---

court panel, along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and preference. To insure a validly consolidated panel, Petitioners reluctantly brought 28 U.S.C. § 47 to the attention of the Court. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

* Petitioners were not informed of this action by the three-judge court until June 11.

now proceeding full speed to implement the new grant schedules by July 1. In response to Judge Weinstein's proceeding to enter summary judgment by June 18, New York sought an order staying proceedings in the District Court, which was denied by Judge Weinstein on June 12, granted by the Court of Appeals *ex parte* on June 13 and vacated after hearing on June 16.* Petitioners' simultaneous motion to the Court of Appeals to enter an order reflecting their apparent decision on the appeal, with opinions to follow in due course, so that review would be clarified in this Court, was denied, as was Petitioners' application to vacate the critical stay.

With a determinative stay of the injunction, final dissolution of the three-judge court, and refusal by the Court of Appeals to enter an order, Petitioners are without a forum, save this Court, for any review before full and well nigh irreversible implementation of the reduced grant schedules for 850,000 AFDC recipients.

* The denial of the stay of proceedings in the district court restricts the issuance of any further injunctive relief upon final judgment.

MOTION TO EXPEDITE: TO PREVENT NEW YORK FROM VIOLATING ITS FEDERAL TRUST AND THEREBY CAUSING IRREPARABLE INJURY TO 850 THOUSAND NEEDY CHILDREN AND MOTHERS, AN EXPEDITIOUS FINAL DETERMINATION OF THE ISSUES PRESENTED MUST BE HAD. ALTERNATIVELY THE STAY ISSUED BY THE SECOND CIRCUIT MUST BE VACATED.*

A. *Irreparable Injury to Petitioners*

The substantial and uncontroverted evidence in the record shows that the present standards of assistance to needy families in New York is below the minimum requirements compatible with health and decency. Eminent officials charged with the administration of public assistance in New York, such as Mitchell Ginsberg, Commissioner of the Human Resources Administration, and Jack Goldberg, Commissioner of the New York City Department of Social Services, serving 675,000 of the 850,000 AFDC recipients, testified that "the present standards of assistance provide for life on a level of sustenance, nothing more, and often less," and that "we have not met the minimum standard that people need in this city to maintain themselves." Transcript, April 23, Document No. 61, pp. 76, 87-106, 108, and Appendix (22A, § 42A). The stringent food budget was said to be the only available resource recipients could use

* An in-chambers application is being made to Mr. Justice Harlan, Circuit Justice for the Second Circuit, to vacate the stay as interim relief pending a decision or order on the injunction in the Second Circuit and the within proceedings in this Court. The stay requested herein is in the event that Mr. Justice Harlan refers the in-chambers application to the Court or in the event the Court wishes to consider the stay request as an integral part of the within application to expedite.

to meet essential needs of clothing and home furnishings now unbudgeted under the new law. Prominent professors of medicine, doctors, social workers and others dealing with New York's AFDC recipients attested that gross nutritional deficiencies and the grievous and permanent consequences of such deprivation were commonplace among AFDC families in New York. These are the stark facts of subsistence or below-subsistence life (142a-158a).

In light of this uncontradicted evidence, the District Court found that families "are at or below a bare subsistence level . . . (and) a reduction in welfare benefits putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits." Appendix (22A). It may also "irreversibly retard mental and physical development . . ." Appendix (22A). These findings have not been disturbed on appeal. If it is ultimately found that the New York reductions do indeed violate Petitioners' rights under the federal mandate, there is nothing which any Court or any agency can do to repair the grievous injuries illegally inflicted upon these needy children. The money lost will not be repaid, for there is no law, federal or state, requiring in these circumstances retroactive payment of grants improperly withheld or reduced in violation of a Social Security Act command.* Furthermore, money cannot repair or ameliorate the permanent mental and physical injury caused an unborn child because his mother did

* Under both H.E.W. Regulations and New York law, retroactive payment of grants wrongfully reduced or withheld is available only when the recipient has made timely request for and prevailed in an administrative "fair hearing." 18 N.Y.C.R.R. § 352.5 (N)(b); Handbook of Public Assistance Administration, Part IV, § 6300(g).

not have an adequate diet, for the destruction of a family unit resulting from physical deprivations, or for educational retardation from nutritional inadequacy. These all too likely injuries to tens of thousands of vulnerable needy mothers and children in New York will indeed be irremediable.

B. *Violation of New York's federal trust*

It is true that needy children in many other states receive less assistance than children in New York and that even now these children suffer the irreparable harms and deprivations that petitioners here seek to prevent in New York. Whatever one may personally feel about this, a needy child in the United States has no traditional right under our Constitution and laws to be saved from the grievous and permanent injury which results from malnutrition, physical deprivation, and educational retardation. As a partial and modest response to this stark fact, Congress enacted Section 402(a)(23). Petitioners believe and the District Court and H.E.W. agree, that in light of the 10.1% increase in living costs in New York, this federal plan condition prohibits these harmful reductions of subsistence grants. This finding too still stands undisturbed, and will stand after the appeal is disposed of on dubious jurisdictional grounds. 402(a)(23) also prohibits reductions in other states, which are now following New York's lead. Thus, the issue is not the humanitarian one whether the state is free to cause irreparable injury to needy children by refusing the basic sustenance of life. It is whether New York may do so in violation of a specific federal command, while continuing to use very considerable federal monies given in exchange for New York's pledge to obey these federal commands.

These monies, once disbursed, cannot be recovered. Although unique among federal regulatory programs, the use of federal monies whilst in violation of the federally imposed conditions is traditional and commonplace in the AFDC program, a program with a notorious history of non-compliance and non-enforcement by H.E.W. or the courts, federal or state. H.E.W. has, for well-known reasons, been quite unable to obtain compliance by the regulated group, the states, as attested to by the years of protracted and relatively ineffective negotiations during which federal monies continue to flow.* The only remedy at its disposal —cutoff after years of fruitless exhortation was tried but once and that in 1938.** The brutal facts of subsistence life do not permit the luxury of time.

Until recently, recipients, the persons protected by the plan conditions in 402(a)(1)-(23) were without the wherewithal to commence actions in federal courts to secure these federal rights. While the subject matter of these suits—conflicts between state and federal law—is not new to the federal courts, that these suits are not well received

---

* The widespread failure of states to comply with the mandates of the Social Security Act results partly from the passive and conciliatory role taken by H.E.W. As State Commissioner King succinctly stated in *King* v. *Smith, supra,* Appellants' Reply Brief at 15, "the Federal Government has never had enough guts themselves to define what a substitute parent policy would be." See also, W. Bell, Aid to Dependent Children (Colum. Univ. Press 1965), pp. 71-73; *King* v. *Smith, supra,* 392 U.S. 317 at n. 12.

** See, Altmeyer, *The Formative Years of Social Security* (Univ. of Wis. Press 1968), pp. 75-83. H.E.W. has acknowledged for over two years that New York's fair hearing rules are out of conformity with the federal Act, but still the agency refuses to even order a conformity hearing, on the grounds that hearings will be held only when "deficiencies in the State's public assistance program are so serious, and attempts to obtain correction are so unpromising, that the Federal payments must be withdrawn . . . ." Letter of May 6, 1969, to Richard Flaster from Robert H. Finch, Record, Document No. 51.

where gross violations demand substantial relief is seen in the curious and hasty disposition of the constitutional claim and dissolution of the three-judge court, cf. *Florida Lime & Avocado Growers Inc.* v. *Jacobsen*, 362 U.S. 73, (1960), and in the fact that both the Circuit Court and the three-judge district court apparently believed that the enforcement of AFDC, alone among scores of federal regulatory programs, was not an appropriate matter for the federal courts.

Thus, what is at issue here is whether there can be effective enforcement of federal commands duly enacted in our national legislative process, in which the states are not an unheard voice. This Court's decision in *King* v. *Smith* was a major step in answering this question affirmatively. But it is not being so read below. The State persistently sought to have that decision limited strictly to its facts, arguing alternatively that: (1) the federal courts were available only where the district court initially invalidates the welfare rule on constitutional grounds (B. 39);* (2) the regulation in *King* was not part of Alabama's state plan for AFDC (B. 41); (3) *King* does not apply to state statutes (B. 42); (4) H.E.W. had approved the substitute father rule in *King* (B. 47) even though this Court said the opposite, 392 U.S. at n. 23; (5) and that "aid to all eligible individuals" does not mean the aid required by 402(a)(23). The Court of Appeals seemingly shared some of these doubts.

The impunity and disregard with which even New York, a leadership state in welfare matters, regards the federal commands to protect poor people is seen in the manner in which these reductions were effectuated. In the teeth of a

* Appellant's Brief, Court of Appeals.

federal statutory command, the legislature took unto itself the task, previously left to the respondent, of setting grant levels, abolished respondents' power to make the cost of living adjustment for this very year, and reduced grants without any prior submission to H.E.W. of this major revision in the state AFDC plan.

The reduced grants mandated by the statute were "deemed to make adequate provision for all items of need." The Respondent was thus rendered powerless voluntarily to comply with the federal law even though H.E.W. has indicated that the cutbacks "raised a question of conformity" with Section 402(a)(23) (130a). In this context, negotiation with H.E.W. is a ritual signifying nothing, and other states now follow New York's regrettable lead on the "requirements" of 402(a)(23). Only this Court can prevent the impotency of AFDC federal commands from being once again unconscionably confirmed.

This assuredly is one of those unusual cases in which the legitimate interests of either party and the national interest may be vindicated only by a prompt, authoritative determination of the merits of the claim. It has been so treated by both the District Court and the Circuit Court until the Circuit Court's stay without opinion or judgment on June 11 and refusal to vacate on June 16. This stay effectively determines the case, but not the merits.

New York says, and it is true, that to require continued payments at the present rates will cost some 10 million dollars a month more than Section 131-a. This is a considerable amount of money, to be sure, but it also is very telling, if not conclusive, evidence that implementation of Section 131-a will not be in compliance with § 402(a)(23)

on and after July 1, 1969. If preservation of the *status quo* costs $10,000,000 in grants each month it ineluctably follows that the grants payable under 131-a are not equivalent to present standards and certainly do not "reflect fully changes in the cost of living." Further, reversion to the *status quo* after implementation could not be done with all deliberate speed in less than eight to twelve weeks, perhaps longer, and with enormous administrative expense and dislocation.

In situations such as this, the overwhelming national interest and prevention of serious harms require prompt and final decision by this Court. See cases listed in Rule 20 of the Supreme Court Rule, *Williams* v. *Rhodes,* 37 U.S.L.W. 4001 (1968); *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420; *Aaron* v. *Cooper,* 358 U.S. 27, 1 (1958); *Wilson* v. *Girard,* 354 U.S. 524, 928 (1957). Without derogating the monetary interests asserted by, for example, the steel companies in *Youngstown Sheet and Tube* v. *Sawyer, supra,* the right of Negro children to attend Central High School in Little Rock in the Fall of 1958 (*Aaron* v. *Cooper*) or the right of the Civil Rights Commission to resume hearings (*Hannah* v. *Larche*), Petitioners urge this Court to treat the interests set out above as similarly worthy of the extraordinary review requested.

C. *Finality of the proceedings below*

While this petition is addressed to the stay of a preliminary injunction, neither the case nor the 402(a)(23) issues are in a preliminary form. The case was fully briefed and argued on a very considerable and explicit record in the District Court and Court of Appeals. The

issues, both jurisdictional and substantive, were joined at the outset and there is no genuine dispute over any material or dispositive facts. There is also no lack of evidence supporting the findings underlying the injunction. As the Respondents put it in seeking a stay of further proceedings, "the preliminary injunction is for all intents and purposes a final judgment disposing of the entire 402(a)(23) claim."

In light of the Circuit Court's early endorsement of prompt further proceedings in the District Court and its later restriction on any further injunctive relief upon summary judgment, the predicate for reversal of the District Court is very much jurisdictional. Jurisdiction was the focus of the argument and issues considered in the Court of Appeals. That question is whether *King* v. *Smith* does or does not control this case. Review of the judgment of the three-judge court is sought since it bears on the jurisdiction *vel non* of the District Court under *King* v. *Smith*. This incorrect jurisdictional ruling should not be allowed to determine the outcome of this case solely because of the passage of time. The questions presented are accordingly appropriate for the prompt consideration and disposition of this Court.*

D. *Vacating of Stay***

Several reasons coalesce in this case to render the accepted deference to state law and processes inappropriate.

---

* The fulsome briefs and record developed in the Circuit Court permit briefs to be filed in this Court within one week or less. Judge Weinstein will render final judgment on June 18.

** The following is included for the convenience of the Court in the event Mr. Justice Harlan wishes to refer the in-chambers application to the Court for disposition or in the event the Court deems expedition and stay inseparable applications.

First, the likely harms from implementation of 131-a are set out at length in the District Court's opinion. These harms cannot be remedied by monetary restitution, as recognized in numerous other AFDC cases.

See *Green* v. *Department of Public Welfare* (stay denied Sept. 1, 1967, Black, J.); *Harrell* v. *Tobriner* (stay denied Dec. 29, 1967, Brennen, J.); *Smith* v. *Reynolds* (stay denied Jan. 4, 1968, Brennen, J.); *Burns* v. *Montgomery* (stay denied May 10, 1968, Douglas, J.); *Kelly* v. *Wyman* (stay denied Jan. 10, 1969, Harlan, J.); *Williams* v. *Dandridge* (stay denied, Warren, C.J.); *Lampton* v. *Bonin*, —— F.Supp. —— (E.D.La. 1969).

Second, there is a very substantial likelihood that New York is, or will be, as of July 1, in very serious violation of the Social Security Act, and that New York has done precisely what Congress sought to prohibit in the federal stabilizing statute. As the New York Legislature candidly stated, the new statutory grants are based on "the costs of delivering the needs of recipients," and are necessitated by "the rising welfare rolls and expenditures therefrom." Section 131-a, New York Social Services Law.

Third, to be considered with this highly likely and serious violation, there is the enormous administrative change that will take place in implementing 131-a throughout the state and the substantial delay and administrative dislocation in a reversal to the current levels. Any interruption in the injunction permits New York to take these irreversible steps towards implementation, steps which are highly likely at this late date. Hence, it is critical to the possibility of effective relief upon adjudication that this interregnum created by the stay cease forthwith.

Fourth, there is the manner in which New York has treated its federal obligation under the Social Security Act in enacting these grant levels in statutory form and seeking to implement them without regard to conformity with federal mandate.

Fifth, because Petitioners sue to enforce the federal statute commanding the states to act in a federally-defined interest, Petitioners assert an independent national interest in having the AFDC program administered in accordance with the purposes and manner Congress specified. That national interest, expressed in 402(a)(23), is to prevent deterioration in grant levels because of rising welfare rolls and to prevent that by July 1, 1969. There is also the profound national interest in seeing that millions of dollars of federal monies are *not utilized where a state plan* is in plain conflict with the Social Security Act. New York does intend to utilize these monies. These interests are the public interest in this case and deserve weighty consideration.

Sixth, also to be considered here is the likely basis for the stay in the Court of Appeals, which is jurisdictional. Lack of federal court jurisdiction would be an incorrect holding for the reasons set out in Judge Weinstein's opinion. It simply is contrary to *King* v. *Smith, supra.* It also is a fundamentally unfair result, since it is based upon the dubious findings and dissolution of the three-judge court, those findings accepted as unreviewable in the Court of Appeals.

For these reasons, Petitioners believe there is a high likelihood of prevailing in this Court, which would automatically reinstate the injunction below. That reinstatement, after review in this Court, would be largely ineffec-

tive for months and would be administratively very expensive.

In sum, the Circuit Court has, at this very late but critical stage of this lawsuit, placed the risks and burdens pending adjudication on the backs of the Petitioners, and, we would add, the federal government. We submit that this burden has been misplaced. Since neither the Petitioners' very real interest in the rudiments of human life nor the national interest in the lawful and proper use of enormous federal monies can be effectively vindicated by adjudication long after implementation, this risk and burden, pending review in this Court, should be borne by the State.

In these circumstances established federal practice would appear to support Petitioners' application to vacate the order of the Second Circuit. This Court and individual Justices have traditionally acted to prevent irreversible acts by state officials which would raise "insurmountable practical problems . . . should the judgment [below] be reversed by this Court." *Williams* v. *Rhodes,* 89 S. Ct. 1 (1968) (Stewart, J. granting temporary order against Ohio election officials). Such "insurmountable problems" would certainly result if New York was permitted to implement its reduced budgetary standard.

Petitioners are seeking to preserve for review important questions regarding the effect of 402(a)(23) and, hence, of the entire AFDC program on a national scale. See, *McCleod* v. *General Electric Co.,* 385 U.S. 533 (1966), in which the Circuit Court stay was vacated because both the District Court and the N.L.R.B. believed preliminary relief necessary. Here, the District Court saw an overwhelming necessity for such relief, and H.E.W., though

not as straightforward as the N.L.R.B., found in the jargon characteristic of the agency that New York's reductions "raised questions" (130a).

The traditional standard of appellate review of district court actions under Rule 62(c) has been not to disturb the lower court's judgment unless there has been an abuse of discretion. 7 *Moore's Federal Practice* (2d Ed.) § 62.05. *Magnum* v. *Coty,* 262 U.S. 159 (1923). Under the circumstances outlined above, we submit that the Second Circuit has not made an adequate finding of such abuse. Indeed it has made no finding at all at this late critical stage. Nor will it enter an order to clarify proceedings in this Court. When it is impossible to say that the District Court abused its discretion, and when the granting of the preliminary injunction does not moot the ultimate issues, but indeed preserves them for consideration by this Court, it is entirely appropriate for the District Court's judgment to be enforced pending consideration by the full Court. *Public Service Board of Vermont* v. *U.S. Interstate Commerce Commission,* 87 S. Ct. 3 (1966). We believe these considerations warrant the vacating of the stay below.

THE TRADITIONAL REASONS FOR GRANTING CERTIORARI PLAINLY EXIST HERE

1. The substantive question presented in this case involves the application and enforcement of a significant provision in a federal regulatory program effective in fifty states. The rights at stake—the right of 5.6 million* needy children and mothers to receive modest increases rather than immodest decreases in subsistence grants—could hardly be more fundamental.** Even a slight increase in welfare grants is of monumental importance to a family living at the edge of subsistence; any decrease threatens the health and safety of large numbers of highly vulnerable children and families. The mandated increase in welfare grants is also a highly significant matter to the states, for even though grants to individual families are precariously low, collective welfare expenditures are large. In 1968, total expenditures, federal, state, and local, for AFDC grants were 2.7 billion dollars.*** A cost of living increase imposed on this figure is no mean amount.

2. Even though Section 402(a)(23) does not require increased assistance until July 1, 1969, and consequently there has been little occasion for judicial interpretation of

---

* See, "Welfare in Review", U.S. Department of H.E.W., Vol. 6, p. 28 (September-October, 1968).

** This truly is a case raising "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Former Chief Judge Vinson, Work of the Federal Courts, Address to the American Bar Association, Sept. 7, 1949, 69 S. Ct. Reporter V, explaining the criteria for granting certiorari.

*** "Welfare in Review", U.S. Department of H.E.W., Vol. 6, p. 28 (September-October, 1968).

the federal statute, there already exists a substantial conflict between the interpretation given it by the Department of Health, Education and Welfare, on the one hand, and by the only two federal judges who have construed the federal provision on the other.*

3. The essence of what Congress intended to compel with 402(a)(23) and the fundamental national policy underlying it renders expeditious and authoritative application and enforcement imperative. Congress gave the states almost two years to comply with the federal mandate; the cost of living throughout the country has continued to spiral during that period; the provision is in its nature an interim and temporary solution to a grave and urgent problem; many states are not providing for the increases mandated by the statute, and indeed many states including New York are reducing grants despite the requirement of the federal statute and the rising cost of living. Such backsliding is in the teeth of a national legislative policy requiring progression. It is obvious that if the provision is to carry out the will of Congress and prevent the very evils Congress sought to avert, it must have effect immediately, not six to twelve months hence.

---

* Although H.E.W. agrees with the district court that reductions in the level or content of the standards of need such as those effectuated in New York violate 402(a)(23), the federal agency would allow states to impose ratable or percentage reductions on the amount of aid paid, after upward adjustment of the standard of need. See, H.E.W. Amicus Brief, *Lampton* v. *Bonin*, Civ. No. 68-2092 (E.D. La. 1968) at p. 160a. The federal judges have rejected this interpretation as inconsistent with the plain language of the statute and as reducing the federal requirement to an exercise in futility. *Lampton* v. *Bonin, supra* (dissent, majority did not reach the issue).

4. Section 402(a)(23) represents a deliberate and obviously considered departure from the former policy, recognized by this Court in *King* v. *Smith, supra,* of allowing the states wide latitude in determining both standards of need and the amounts of payments under AFDC. In making the pricing adjustment a plan condition for continued participation in the AFDC program, Congress made unequivocally plain its intention to compel the states to make modest increases in AFDC payments. Since this new plan condition does represent a departure from the previous law leaving grant levels to state determination, it is not likely to be enthusiastically received by the states, *vide* New York. While H.E.W. has had a notable lack of success in enforcing the other plan conditions for participation in AFDC, such as condition number nine [now 42 U.S.C. § 602(a)(10)], enforced by this Court in *King* v. *Smith, supra,* any administrative enforcement of plan condition number twenty-three will be well nigh impossible. For obvious reasons, state welfare officials have much greater freedom to comply when H.E.W. "raises questions" about an eligibility provision or a rule concerning procedural remedies than when the federal agency questions the level of the state grant schedule for AFDC. It was in recognition of the fact that compliance with the federal statute could most reasonably be had through state legislative action that Congress allowed ample time for compliance. Yet at the very legislative session in which New York was to make the necessary adjustments, it ignored 402(a)(23) and reduced grants. If a state so tradi-

tionally enlightened with respect to welfare matters can thus eviscerate and avoid the plain requirements of the federal statutory mandate, the federal law provides little remedy or relief for other needy children around the country.

5. In view of the substantial concerns of both the recipients and the States in the proper construction and interpretation of Section 402(a)(23), this issue will be before this Court. Final argument on the substance of 402(a)(23) has already been had before three-judge federal courts in Texas, Louisiana and Georgia. But review and enforcement months after the target date Congress set is not only to undermine the purposes of 402(a)(23) but once again to tolerate the improper use of unrecoverable federal monies. Moreover, review months hence may render compliance in some states near impossible, because their legislatures have failed to establish the appropriate schedules or appropriate the amount necessary to administer AFDC in accordance with federal law. These problems are not insubstantial and the national interest in review now not inconsiderable.

CONCLUSION

The petition for a writ of certiorari and motion to expedite should be granted.

Respectfully submitted,

LEE A. ALBERT
Center on Social Welfare Policy and Law
401 West 117th Street
New York, New York 10027
Tel. No. (212) 280-4112

HENRY A. FREEDMAN
SYLVIA ANN LAW
ROBERT P. BORSODY
Of Counsel

CARL RACHLIN
JAMES SPITZER
DAVID DRASCHLER
General Counsel, National Welfare Rights Organization
c/o Scholarship, Education and Defense Fund, Inc.
164 Madison Avenue
New York, New York 10016

MARTIN GARBUS
Roger Baldwin Foundation of the American Civil Liberties Union
156 Fifth Avenue
New York, New York 10012

BURT NEUBORNE
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DAVID GILMAN
General Counsel, City-Wide Coordinating Committee of Welfare Groups
c/o MFY Legal Services Inc.
759 10th Avenue
New York, New York

CESAR PERALES
Williamsburg Legal Services
260 Broadway
Brooklyn, New York 11211
(*for Petitioner Rosado*)

VIRGINIA SCHULEI
Brownsville Legal Services
424 Stone Avenue
Brooklyn, New York
(*for Petitioners Folk and King*)

EDWARD V. SPARER
The Yale Law School
New Haven, Connecticut 10520

HAROLD J. ROTHWAX
DAVID A. DIAMOND
MARIANNE J. ROSENFIELD
MFY Legal Services, Inc.
320 East Third Street
New York, New York

MORT COHEN
South Brooklyn Legal Services
152 Court Street
Brooklyn, New York 11201
(*for Petitioner Hernandez*)

MORTON FRIEDMAN
112-10 Farmers Boulevard
St. Albans, New York

June, 1969